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U.S. DISTRICT COURT E.D.N.Y.

★ MAR 01 2016 ★

CV 16 1034
BIANCO, J. Page 2

LONG ISLAND OFFICE

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court		District EASTERN
Name (under which you were convicted): JAMEL FLOYD		Docket or Case No.: 914N/08
Place of Confinement: CLINTON CORRECTIONAL FACILITY		Prisoner No.: 10-A-3917
Petitioner (include the name under which you were convicted) JAMEL FLOYD		Respondent (authorized person having custody of petitioner) v. MICHAEL KIRKPATRICK
The Attorney General of the State of ERIC T. SCHNEIDERMAN		<div style="border: 2px solid black; padding: 5px; text-align: center;"> RECEIVED FEB 22 2016 PRO SE OFFICE </div>

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: SUPREME COURT OF NASSAU, 100 SUPREME COURT DRIVE, MINEOLA, N.Y. 11501
- (b) Criminal docket or case number (if you know): 941N/08
- (a) Date of the judgment of conviction (if you know): February 11, 2009
- (b) Date of sentencing: June 11, 2010
- Length of sentence: Fifteen (15) years
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: Burglary 1; Burglary 2; Tampering; Endangering Welfare of a Child.
- (a) What was your plea? (Check one)

(1) Not guilty <input checked="" type="checkbox"/>	(3) Nolo contendere (no contest) <input type="checkbox"/>
(2) Guilty <input type="checkbox"/>	(4) Insanity plea <input type="checkbox"/>

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐

7. Did you testify at either a pretrial hearing, trial or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: SUPREME COURT APPELLATE DIVISION SECOND DEPARTMENT

(b) Docket or case number (if you know): _____

(c) Result: AFFIRMED

(d) Date of result (if you know): JULY 25, 2012

(e) Citation to the case (if you know): 97 A.D.3d 837

(f) Grounds raised: THE PROSECUTOR'S SUMMATION COMMENTS REGARDING JAMEL FLOYD'S FAILURE TO CALL ADDITIONAL ALIBI WITNESSES AMOUNTED TO PROSECUTORIAL MISCONDUCT AND DENIED HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. JAMEL FLOYD WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF DEFENSE COUNSEL'S FAILURE (See attached Page 3A)

(g) Did you seek further review by a higher state court? Yes ☒ No ☐

If yes, answer the following:

(1) Name of court: NEW YORK STATE COURT OF APPEALS

(2) Docket or case number (if you know): _____

(3) Result: APPLICATION FOR LEAVE TO APPEAL DENIED

(4) Date of result (if you know): OCTOBER 29, 2012

(5) Citation to the case (if you know): 19 N.Y.3d 1002

(6) Grounds raised: THE PROSECUTOR'S SUMMATION COMMENTS REGARDING JAMEL FLOYD'S FAILURE TO CALL ADDITIONAL ALIBI WITNESSES AMOUNTED TO PROSECUTORIAL MISCONDUCT AND DENIED HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS (See attached pg. 3A).

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): _____

(3A)

TO REQUEST AN AFFIRMATIVE DEFENSE CHARGE REGARDING BOTH THE FIRST DEGREE ROBBERY AND BURGLARY CHARGES THAT THE OBJECT DISPLAYED WAS NOT A LOADED WEAPON CAPABLE OF PRODUCING DEATH OR OTHER SERIOUS PHYSICAL INJURY.

(g). AND A FAIR TRIAL

(g6) JAMEL FLOYD WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF DEFENSE COUNSEL'S FAILURE TO REQUEST AN AFFIRMATIVE DEFENSE CHARGE REGARDING BOTH THE FIRST DEGREE ROBBERY AND BURGLARY CHARGES THAT THE OBJECT DISPLAYED WAS NOT A LOADED WEAPON CAPABLE OF PRODUCING DEATH OR OTHER SERIOUS PHYSICAL INJURY.

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: NASSAU COUNTY SUPREME COURT

(2) Docket or case number (if you know): 914N/08

(3) Date of filing (if you know): JANUARY 30, 2014

(4) Nature of the proceeding: MOTION TO VACATE THE SENTENCE 440.20

(5) Grounds raised: INFORMATION USED BY THE PEOPLE TO ADJUDICATE THE DEFENDANT A SECOND VIOLENT FELONY OFFENDER WAS JURISDICTIONALLY DEFECTIVE. DEFENDANT HAD NOT BEEN HELD FOR GRAND JURY ACTION WITH RESPECT TO THE CHARGE, AS REQUIRED BY THE CONSTITUTION AND STATUTORY PROVISION GOVERNING WAIVER OF INDICTMENT: AND THE DEFENDANT WAS NOT PROPERLY ADJUDICATED AS A SECOND VIOLENT FELONY OFFENDER PURSUANT TO CPL § 400.15 SUBDIVISION (2), THE APPLICABILITY OF PENAL LAW § 70.04 SUBD. (1); SUBPARAGRAPH (v) OF (c) AS A NECESSARY APPLICATION OF LAW (SEE PG. 4A)

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☒

(7) Result: MOTION DENIED

(8) Date of result (if you know): 1/13/15

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: NASSAU COUNTY SUPREME COURT

(2) Docket or case number (if you know): 914N/08

(3) Date of filing (if you know): June 3, 2014

(4) Nature of the proceeding: MOTION TO VACATE THE JUDGMENT CPL 440.10

(5) Grounds raised: WHETHER THE DEFENDANT WAS DEPRIVED OF HIS NEW YORK AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW WHEN HIS ATTORNEY FAILED TO ADVISE HIM CONCERNING THE COMMITMENT AS INSTRUCTED TO BY THE COURT AND PRESCRIBED BY THE LAW: AND WHETHER THE DEFENDANT WAS DEPRIVED HIS NEW YORK AND FEDERAL CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW WHEN TRIAL ATTORNEY FAILED TO CALL THREE OF DEFENDANT'S ADDITIONAL ALIBI WITNESSES.

(4A)

(11[a]) IN SUCH PROVISIONS WERE ABSENT, MISSING AND NEVER
EXISTED AND COULD NOT BY THIS COURT HAVE APPLIED.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☒

(7) Result: MOTION DENIED

(8) Date of result (if you know): 1-13-15

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☒ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: THE PROSECUTOR'S SUMMATION COMMENTS REGARDING JAMEL FLOYD'S FAILURE TO CALL ADDITIONAL ALIBI WITNESSES (See, attach 6A)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The People's comments during summation that Petitioner failed to call additional alibi witnesses clearly shifted the burden of proof to Petitioner in violation of petitioner's Federal Constitutional. The shifting of the burden of proof is impermissible under the due process of law clause.

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

(6A)

(12) GROUND ONE: AMOUNTED TO PROSECUTORIAL MISCONDUCT AND DENIED HIM HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: JAMEL FLOYD WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF DEFENSE COUNSEL'S (See 7A).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Even though there was clearly ample evidence that should have led trial counsel to request that the affirmative defense to the charges against, trial counsel's failure to do so, deprived petitioner of his right to effective assistance of counsel. The statement made by the prosecution witness was unrefuted by the People.

(7A)

FAILURE TO REQUEST AN AFFIRMATIVE DEFENSE CHARGE REGARDING BOTH THE FIRST DEGREE ROBBERY AND BURGLARY CHARGES THAT THE OBJECT DISPLAYED WAS NOT A LOADED WEAPON CAPABLE OF PRODUCING DEATH OR OTHER SERIOUS PHYSICAL INJURY.

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinions or orders, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: MARK GROOTHIUS, ESQ., 64 HILTON AVENUE,
HEMPSTEAD, NEW YORK 11550

(c) At trial: MARK GROOTHIUS, ESQ., 64 HILTON AVENUE, N.Y. 11550

(d) At sentencing: MARK GROOTHIUS, ESQ., 64 HILTON AVENUE, HEMPSTEAD,
NEW YORK 11550

(e) On appeal: JILLIAN S. HARRINGTON, ESQ., P.O. BOX 6006, MONORE
TWP., N.J. 08831

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner did not received the New York State Court of Appeals decision denying him Leave to Appeal until on or about November 28, 2012, even though the decision was dated October 29, 2012, but because petitioner was in UpState facility, and later transferred the decision was not received by Petitioner until after petitioner was in a new facility. Petitioner filed a timely Post-Conviction Motion (C.P.L. 440.20), on January 30, 2014 and another on June 3, 2014 (C.P.L. 440.10), which was denied on January 13, 2015. The reason why Petitioner was later in filing his Post-Convictions motion, was because the Department of Correction and Community Supervision kept transferring petitioner from one facility to another; i.e., 8-14-12 Upstate; 8-14-12 Great Meadow; 10-8-13 Sing-Sing; 11-27-13 Cayga SHU; 1-14-14 Auburn; 3-7-14 Green Haven; 6-14-15 Sing-Sing; 6-24-15 Ulster SHU; 7-27-15 Mid-State; and 7-28-15 SouthPort. All of these transfers made it hard for petitioner to start and complete his legale motions because petitioner request for law library material and help was denied by correction staff.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: To review the petition
and grant petitioner a new trial, because the State Court
violated petitioner's due process rights.
or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this
Petition for Writ of Habeas Corpus was placed in the prison mailing system on FEBRUARY 8,
2016 (month, date, year).

Executed (signed) on FEBRUARY 8, 2016
[Signature] (date).

[Signature]
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing
this petition. _____

